

MONDAY, JANUARY 11, 2010

LEED Buildings Are Sprouting All Over, but They Come With a Price

The Legal Costs of Going Green

By Jason W. Armstrong
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Score one point if you reuse scraps from your construction project.

Add another point if your materials come from within 500 miles of your building site.

And if you power your structure with on-site renewable energy, well, you've banked four more points.

It's not a game. It's the U.S. Green Building Council's Leadership in Energy and Environmental Design, or LEED—the nation's most popular scorecard for environmentally sustainable construction of everything from new office towers to schools and courthouses.

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ROBINS, KAPLAN, MILLER & CIRESI LLP

More projects than ever before are vying for the privilege of crowning themselves, from lowest to highest, LEED "Certified," "Silver," "Gold," or "Platinum"—depending on how many points they have racked up in dozens of environmental categories and subcategories. Benefits of the designation include tax breaks, lower long-term energy costs and better marketing opportunities.

The sharp spike in interest—8,000 of the nation's 25,000 LEED-registered projects got in on the rating system in the first half of 2009 alone—is creating a new set of legal issues for attorneys at the same time as it spells massive changes for the construction industry. On the transactional side, lawyers are increasingly dealing with city ordinances requiring LEED construction and drafting contracts accounting for a wider range of risks involved with seeking such certification. Insurance lawyers say they are



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Attorneys William A. Webster, left, and Amy M. Churan have worked with LEED projects.

planning for what they predict will soon be a flurry of coverage suits involving buildings' green status.

In addition, litigation has popped up over failure of projects to qualify for certain LEED levels, creating additional legal costs for developers on top of their compliance costs.

As such issues become more widespread, attorneys are increasingly taking classes to get LEED-accredited themselves through the Washington D.C.-based Green Building Council to help them gain recognition as experts in the fast-growing field.

"Most development projects are considering LEED components," said James E. Pugh, an associate in Sheppard Mullin Richter & Hampton's Real Estate, Land Use and Environmental Practice Group in Los Angeles. "It's definitely coming more to the forefront, and it's becoming a commonplace thing for attorneys to deal with."

LEED, first developed in 1993, and a host of similar, lesser known competing

building rating systems, have been gaining a bigger foothold in the industry as part of the widening green movement. Among other efforts, under AB 32, adopted in 2006, California plans to cut greenhouse gas emissions to 1990 levels by 2020, and to lower levels by 2050.

Federal efforts include President Obama's signature in October of Executive Order 13154, requiring environmentally friendly construction for most new federal buildings. As part of a green building push by cities across the nation, scores of municipalities including San Francisco, Los Angeles, Boston, New York and Salt Lake City have enacted ordinances requiring LEED ratings for certain types of projects or granting incentives for documented environmentally-conscious planning. For several years, Los Angeles has required public structures such as fire stations and libraries to be LEED certified if they are 7,500-square-foot or bigger.

If projects want fast-track permitting,

LEED Buildings Sprouting But They Come With a Cost

they must be LEED silver to qualify in Los Angeles, and LEED gold in San Francisco.

Incentives abound, said Amy M. Churan, an associate with Robins Kaplan, Miller & Ciresi in Los Angeles who handles insurance and business litigation and has studied LEED extensively. She's preparing to become a LEED "green associate" through the Building Council.

"You're seeing everything from local loan programs to financing and rebates and grants and on and on," Churan said. "Also, building owners generally like to [secure LEED status] for marketing purposes.

"People want to be in the highest building, the best building, or the greenest building." Another reason LEED is gaining such momentum is because such certifications often show compliance with federal or local green standards, said Bryan C. Jackson, a partner with Allen Matkins Leck Gamble Mallory & Natsis in Los Angeles. Jackson is a construction transactional lawyer who edits the firm's Green Building Update bulletin.

"It's saying, 'Here is my certificate of approval from a third party agency. Yes, I really am energy efficient and water efficient,'" Jackson said.

Jackson said he stresses LEED risk to clients when structuring transactions. Working toward LEED status can delay a project or ratchet up the budget, he said.

"As for the schedule, you could run into trouble because if your contract allocates risk to you, the builder, to certify the project LEED silver or gold, there could be a lag time [to gain the status] well after certificate of occupancy," Jackson said. "If you didn't make your schedule, you could have liquidated damages because you can't deliver a building that was certified silver or gold on time."

Litigation over green ratings include a 2008 Maryland case in which a contractor sued a building owner for alleged cost overruns. The owner countersued the contractor for \$1.3 million, in part because the project failed to reach LEED silver status and thus didn't qualify for hundreds of thousands of dollars in green building state tax credits.

The case settled confidentially. *Shaw Development v. Southern Builders*, 19-C-07-011405.

Hans A. Lapping, a shareholder with Miller Starr Regalia in Walnut Creek who chairs the firm's transactional department, said his recent cases involving LEED include representing a tenant moving into an eight-story Sunnyvale office building who is shelling out an extra \$50,000 to get a gold rating.

"We're doing things like using no-water urinals and recycled carpeting," Lapping said. "It's not a huge incremental cost, but there is some."

Legal issues on the horizon will likely include insurance disputes over green ratings, said William A. Webster, a partner at Robins, Kaplan, Miller & Ciresi in Los Angeles who focuses on catastrophic loss insurance cases. He predicted a wave of such suits over the next few years as more projects work to attain the status.

"When a catastrophic loss occurs to a LEED [rated] building, how do you measure the cost to get it back up to certification, and does the insurance company have to respond?" Webster said. "Second, when you have a building that wasn't LEED certified and the owner wants to rebuild with the certification, there will most likely be appraisal issues."

While LEED is becoming the standard scoring system for U.S. building projects, some jurisdictions have developed their own competing green ratings, such as Green Point, a certification program developed by Build It Green, a non-profit advocating healthy energy in California.

Some of those other ratings have ignited political clashes with regions that hold LEED as their standard for green building. In Tennessee, for instance, a city councilman in Antioch, a Nashville suburb, introduced legislation last summer seeking to allow standards other than LEED to fulfill the green building requirements.

The legislation is pending.